Supreme Court, U.S.
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No. 96-1332

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

NORFOLK SOUTHERN RAILWAY COMPANY
and DANNY STEVE GARNER,
Petitioners,

v.

BRUCE LANG, PEGGY LANG and
DOUGLAS K. HAMLIN,
conservator of the estate of CINDA S. KARJALA,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Alabama

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Railroad Safety Act, as interpreted by this Court in *CSX Transportation, Inc. v. Easterwood,* 507 U.S. 658 (1993), pre-empts all state tort claims and effectively immunizes rail carriers against any claims arising out of their failure to exercise ordinary care in the maintenance of existing warning devices and for their failure to warn of known dangerous conditions.

LIST OF INTERESTED PARTIES

All of the parties to this proceeding are correctly listed in the caption of the petition for writ of certiorari, with the exception that Fortis Benefits Insurance Company was a Plaintiff/Intervenor in the *Hamlin v. Norfolk Southern* case.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents request that the Court deny the petition for writ of certiorari seeking review of the judgment and opinion of the Supreme Court of Alabama.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama was entered on July 12, 1996 and is reported at 686 So.2d 1115 (Ala. 1996). The opinion is included in the Appendix to the petition at 1a-24a. The opinions of the Circuit Court of Madison County, Alabama and the Circuit Court of Calhoun County, Alabama are not reported and are included in the Appendix to the petition at 26a-34a.

JURISDICTION

The respondents do not dispute the petitioner's statement regarding the Court's jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Section 205 of the Federal Railroad Safety Act, previously codified at 45 U.S.C. § 434, and currently codified at 49 U.S.C. § 20106, provides:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. **A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.**

(Emphasis added) (The emphasized portion was not included in the quotation of this provision in the petition).

STATEMENT OF THE CASE

The present case involves two separate accidents in which the petitioner's trains collided with motor vehicles driven by Alabama residents. One of these collisions resulted in the total incapacitation of Cinda Karjala, while the other collision resulted in the death of David Lang. Respondent Douglas K. Hamlin is the conservator for his

mother, Ms. Karjala, while respondents Bruce and Peggy Lang are the representatives of their son David's estate. Although the petition merely states that these accidents are "similar," there are a number of factual differences between the two incidents.

a). Hamlin v. Norfolk Southern

On November 23, 1991 at 4:00 a.m., Cinda Karjala ("Karjala") left to visit her mother in Virginia and was driving south during darkness, on Brock Road, a rural road located in Madison County, Alabama. Patchy fog was in the area, and the fog was dense at the crossing. (C. 96-104; 331-332; 334). ("C" refers to the Clerk's Record on appeal).

Brock Road intersects with a rail line of the petitioner, Norfolk Southern, and the grade crossing was owned and under the control of the petitioner. The Brock Road crossing is located at a place where the climatological factors, combined with the topography and geography in the general area of the crossing, have a propensity to be engulfed in fog at various times during the year. (C. 98; 331-332).

The Brock Road crossing did not have any type of active warning devices (lights, bells or gates), but was marked only with passive signs. The crossing was not illuminated. (C. 96-104; 273-275; 277-279). The Brock Road crossing involved a high volume of vehicular traffic, a high number of train movements, a substantial number of school buses and trucks carrying hazardous materials. In addition, the crossing had unusually restricted sight distance and had experienced continuing accident occurrences. Because the Brock Road crossing exhibited hazardous features listed in 23 C.F.R. § 646.214(b)(3), automatic signals and gates should have been installed. There was no evidence that a diagnostic team had excused the absence of active signals and gates.

Karjala drove into the side of the Norfolk train during the time that the train obstructed the crossing. Karjala did not apply her brakes before the collision. Because of the fog, Karjala was not able to see the signs, nor the train. Karjala, therefore, was not aware of the danger of the presence of the train at the crossing. (C. 197; 360; 363-368; 371-378).

The engineer/driver of the train, petitioner Danny Steve Garner ("Garner"), was aware of the fog because, as he was driving the petitioner's train westwardly, he had encountered fog beginning at Nickajack Lake in Tennessee. Garner also had talked by radio to another train engineer, who had commented on the fog. (C. 334-338).

The petitioner's trainmaster, Bryan Harres ("Harres"), was also aware of the dense fog prior to approaching the Brock Road crossing. Harres was driving on the public highway following the train through the fog from Chattanooga to its intended destination in Sheffield, Alabama. (C. 341-357).

In 1984, the Alabama Highway Department, in coordination with the Federal Highway Administration, developed preliminary plans for upgrading the Brock Road crossing, with proposed installation of signals with bells and markings. The Alabama Highway Department requested financial participation by the Madison County Commission. (C. 379-380). The Madison County Commission agreed to participate in the construction costs for such installation. (C. 381). The installation of these active warning devices was never begun. (C. 273-275).

In the trial court, the respondent established the hazardous nature of the Brock Road crossing through the affidavit of a liability expert, Dr. Kenneth W. Heathington. (C. 256-436).

As a result of the collision, Karjala suffered severe permanent personal injuries, disfigurement, brain damage, paralysis, disability and impairment. Karjala incurred

over $1,100,000.00 in medical expenses and over $230,000.00 in lost wages. Future medical expenses were projected at over $5,000,000.00, and future loss of wages was projected at over $945,000.00. (C. 197).

Karjala was declared incompetent by the Probate Court of Madison County, Alabama, and her son, respondent Douglas K. Hamlin, was appointed as her conservator. (C. 109).

b). Lang v. Norfolk Southern

David Alan Lang was killed when a train owned and operated by the petitioner collided with his motor vehicle at a grade crossing in the City of Oxford, Alabama on February 21, 1988 (C. 128). The accident occurred at the intersection of a two-lane road known as Pace Street with the Atlanta-to-Birmingham main line of Norfolk Southern. Pace Street, which runs north-south, crosses the petitioner's line, which runs east-west, in a perpendicular fashion.

At the time of the accident, passive warning devices were present in the form of a standard white crossbuck with black lettering, and in the form of a red octagonal STOP sign with white lettering, both located to the right-hand side of the crossing. (C. 129, 650). There was evidence presented to the trial court that this red STOP sign was smaller by 33% than the minimum size required by the Manual on Uniform Traffic Control Devices. (C. 718). The evidence presented to the trial court established that, while an advance warning sign had been painted on the road at some point prior to the accident, the painted warnings were no longer visible. (C. 256, 735, 788-90). In fact, evidence was presented that the advance warning sign was missing altogether (C. 251, 718). No other warning devices, active or passive, were in place on the south side of the Pace Street crossing. The evidence presented to the trial court also established that vegeta-

tion and brush had been allowed to grow up and had obstructed sight lines to the southeast of the crossing. (C. 183, 189-90, 203).

The track through the Pace Street crossing is classified as Class 4, meaning that freight trains can operate at speeds of up to 60 m.p.h., and passenger trains at speeds of up to 80 m.p.h. (C. 147, 210). The petitioner's representative testified that its track speed for the crossing was 50 m.p.h., slowing to a curve speed of 40 m.p.h. immediately below the crossing. (C. 173). Evidence was introduced of a traffic flow of approximately 1,200 vehicles a day through the Pace Street crossing. (C. 700-01). The Pace Street crossing, therefore, experienced a high volume of vehicular traffic and an unusually restricted sight distance. Because the Pace Street crossing exhibited hazardous features listed in 23 C.F.R. § 646.214(b)(3), automatic signals and gates should have been installed. There was no evidence that a diagnostic team had excused the absence of active signals and gates.

Prior to the collision, David Lang was operating his vehicle in the northbound lane of Pace Street. (C. 129). The petitioner's train — a five-engine, 102-car freight train — was proceeding west. (C. 129, 166). The engineer of the train testified that he put the train "in emergency" (i.e., activated the train's emergency braking), a matter of feet from the point of impact with Lang's vehicle, but was unable to avoid hitting Lang. (C. 175).

Archie Burnham, one of the Langs' designated experts testified that the crossing was unduly hazardous. (C. 706). Burnham rested his opinion, in part, upon the fact that the "crossing was not provided with the standard and minimum traffic control devices," based upon the Manual on Uniform Traffic Control Devices to ascertain the applicable standard. (C. 717).

Evidence was also introduced as to the petitioner's vegetation control practices. James Heard, the petitioner's

track supervisor for the portion of track from Austell, Georgia to Anniston, Alabama, testified that he was in charge of spraying and bushhogging weeds and brush along the track. (C. 456, 460). Heard testified that the brush was cut every two to three years and that weeds were spray-controlled twice a year. (C. 460-61). Heard testified that the purpose of these activities was to try to keep the vegetation from getting too close to the tracks preventing the general public from seeing the approaching trains. (C. 461). Heard did not remember the last time that the Pace Street crossing had been cut. (C. 475). He testified that his assistant patrolled through the Pace Street crossing twice a week by hy-rail looking for defects in track structure, overgrown vegetation, etc. (C. 491-92). Heard also testified that he periodically asked landowners for permission to cut brush off their land that might obstruct the view of the tracks at crossings, and that he had never been denied permission to do this. (C. 468). Heard could not recall ever asking anyone for permission to clear vegetation at the Pace Street crossing. (C. 469). Attached to Heard's deposition was an exhibit that demonstrated the petitioner's policy to periodically cut vegetation on railroad property that interfered with view of the tracks. (C. 536).

REASONS FOR DENYING THE PETITION

a). This Court has historically been very reluctant to find federal pre-emption of state law. As the Court has noted, "consideration of issues arising under the Supremacy Clause start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). In addition, there is a heavy presumption against preemption of state

tort causes of action that would leave injured plaintiffs without a remedy. Because "the regulation of health and safety matters is primarily and historically, a matter of local concern," *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985), the presumption against preemption "is particularly apt" in the area of railroad safety. *Rogers v. Consolidated Rail Corp.*, 948 F.2d 858, 859 (2d Cir. 1991).

This presumption against pre-emption arises from the "basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981), and is not merely a rule of construction. Instead, the presumption is an essential principle of judicial restraint that preserves our system of federalism by "avoiding unintended encroachments on the authority of the States." *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

In light of these fundamental concerns, "[t]he presumption against pre-emption is even stronger against pre-emption of state remedies, like tort recoveries, when no federal remedies exist." *Abbot v. American Cyanamid Co.*, 844 F.2d 1108, 1112 (4th Cir. 1988). As this Court explained in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." 464 U.S. at 251. Justice Blackmun, dissenting in *Silkwood*, was equally emphatic on this point: "The absence of federal regulation governing the compensation of victims is strong evidence that Congress intended the matter to be left to the States." 464 U.S. at 264 n. 7.

The presumption against preemption is not limited to the determination of whether a federal statute pre-empts state law. Even when Congress has explicitly provided for pre-emption, the presumption requires that the courts give "a narrow interpretation of such an express com-

mand." *Medtronic, Inc. v. Lohr*, 116 S.Ct. 2240, 2250 (1996) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992)). In fact, the Court followed this principle to construe the express pre-emption language in the Federal Railroad Safety Act narrowly "in light of the presumption against preemption." *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 668 (1993).

The Court's decisions in *Medtronic, Cipollone* and *Easterwood* involved legislation that was intended by Congress to enhance public safety and, in interpreting the statutes at issue in those cases, the Court preserved state tort causes of action despite express Congressional intent to pre-empt state statutory and administrative regulation.

The Court has previously noted that common-law actions exert only an "incidental regulatory effect," that is less intrusive on federal interests than direct state regulation. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988). It is therefore not inconsistent for Congress to assert broad federal regulatory authority over an activity "while at the same time allowing plaintiffs . . . to recover for injuries." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 258 (1984). As the *Cipollone* plurality stated, "there is not general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damages actions." 505 U.S. at 518. It is conceivable that the availability of compensatory damages may even "complement the federal regulatory standards." *Silkwood*, 464 U.S. at 264 (Blackmun, J., dissenting).

The Court recently addressed the express preemption provision of the Medical Devices Amendments to the Food, Drug and Cosmetics Act, and observed:

> Medtronic's construction of 360k would therefore have the perverse effect of granting complete immunity from design defect liability to an entire industry that, in the judgment of Con-

> gress, needed more stringent regulation in order "to provide for the safety and effectiveness of medical devices intended for human use," . . . . It is, to say the least "difficult to believe that congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct," *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 . . .

Medtronic, Inc. v. Lohr, 116 S.Ct. at 2251.

The alleged pre-emption under the FRSA raises precisely the same concern. As this Court pointed out in *Easterwood*:

> [C]ontrary to the view of the Court of Appeals for the Tenth Circuit, it does not necessarily follow that "[t]he hit-or-miss common law method runs counter to a statutory scheme of planned prioritization." *Hatfield v. Burlington Northern R. Co.*, 958 F.2d 320, 324 ([10th Cir.] 1992). In fact, the scheme of negligent liability could just as easily complement these regulations by encouraging railroads — the entities arguably most familiar with crossing conditions — to provide current and complete information to the state agency responsible for determining priorities for improvement projects.

507 U.S. at 1739.

"The purpose of Congress is the ultimate touchstone" in deciding whether a federal statute pre-empts state law. *Medtronic*, 116 S.Ct. at 2250; *Cipollone*, 505 U.S. at 516. Congress did not enact the FRSA for the purpose of immunizing railroads from liability for negligence, though that is an effect where there has been full compliance with the regulations. *Easterwood*, 507 U.S. at 671. Rather, Congress enacted the FRSA for the purposes of "promoting safety in all areas of railroad operations" and to permit the establishment of nationally uniform regulations and standards. 45 U.S.C.A. § 421 *et seq.*; H.R. REP. NO.

1194, 91st Cong., 2nd Sess. 11, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS, 4104, 4105-4108. Indeed it was Congress' objective that "every railroad crossing in America [would] be provided with modern, up-to-date adequate protection to the risks of each crossing." H.R. REP. No. 118, 93d Cong. 1st Sess, reprinted in 1973 U.S.C.C.A.N. 1859, 1892.

b). The petitioner argues that this Court in *CSX Transportation, Inc. v. Easterwood,* 507 U.S. 658 (1993) began the process of determining under 45 U.S.C. § 434 the pre-emptive effect of federal safety regulations on state tort duties imposed on railroads arising out of grade crossing accidents. The issue before the Court in *Easterwood* was to determine to what extent the Federal Railroad Safety Act of 1970 ("FRSA"), pre-empts state tort claims. 507 U.S. at 661. In *Easterwood,* the Court stated:

> The pre-emptive effect of these regulations is governed by § 434, which contains express saving and pre-emption clauses... **Even after federal standards have been promulgated, the States may adopt more stringent safety requirements "when necessary to eliminate or reduce an essentially local safety hazard," if those standards are "not incompatible with" federal laws or regulations and not an undue burden on interstate commerce.**

507 U.S. at 661 (emphasis added).

The petitioner argues that *Easterwood* mandates the pre-emption of the respondents' state tort claims through the application of 23 C.F.R. §§ 646.214(b). Under 23 C.F.R. §§ 646.214(b), a project for the improvement of a grade crossing must either include an automatic gate or receive Federal Highway Administrator ("FHWA") approval if federal funds "participate in the installation of the [warning] devices." 507 U.S. at 670. As the Court stated in *Easterwood,* "examination of these regulations demonstrates that, **when they are applicable,**

state law is pre-empted." 507 U.S. at 670 (emphasis added).

In the present case, the petitioner contends that merely because federal funds were used for the installation of the warning devices all of the respondents' state law claims are pre-empted. In support of this contention, the petitioner relies on 23 C.F.R. §§ 646.214(b)(3) and (4). In *Easterwood* the Court held that these provisions "displace state and private decision making authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained." 507 U.S. at 670. As the Court concluded: "In short, for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection." 507 U.S. at 671.

Although this Court's decision in *Easterwood* makes it clear that if the regulations apply the FRSA relieves railroads of responsibility for the choice of the safety devices to be installed, and even as to the responsibility for the installation of such devices, *Easterwood* does not stand for the proposition that the FRSA or 23 C.F.R. §§ 646.214(b)(3) were intended to relieve the railroads of **all** responsibilities for grade crossings once the new devices were chosen and installed.

The petitioner's argument is that merely because federal funds were used in the installation of new devices at grade crossings, the petitioner is no longer legally responsible for, or has any duties whatsoever with regard to those grade crossings. The petitioner seems to suggest that because federal funds might have been used in the selection and installation of safety devices, the railroad is no longer responsible for the maintenance and warning of dangerous conditions at the crossings. Such a holding would obviously leave the petitioner and other rail carriers free to abdicate all responsibility and to simply close their eyes to known dangers at thousands of crossings

across the nation. Essentially, if this Court were to accept the petitioner's argument, the Court would be sanctioning gross negligence or even willful misconduct on the part of rail carriers, so long as it occurs at a grade crossing containing a federally funded safety device.

c). The petitioner's argument for expanded pre-emption in this case is wholly dependent on its assertion that pre-emption applies **automatically** merely because federal funds were used to install safety devices at these crossings. Neither the FRSA, the regulations promulgated pursuant thereto, nor this Court's decision in *Easterwood* support this assertion. In *Easterwood*, the Court noted that "under §§ 646.214(b)(3) and (4), a project for the improvement of a grade crossing must either include an automatic gate or receive FHWA approval if federal funds 'participate in the installation of the warning device.'" 507 U.S. at 670. It is, of course, undisputed that neither of the crossings at issue in the present case had automatic gates. Therefore, in order for the regulations to afford the petitioner any protection in these cases, it is incumbent upon the petitioner to establish that the absence of automatic gates at these crossings received the approval of the FHWA. The petitioner, however, has failed to produce any evidence that these crossings received such approval. As a consequence, as a practical matter, the petitioner failed to carry its burden of proof that it was entitled to any protection under the FRSA.

In reality, *Easterwood* determined that the FRSA pre-empted state law within narrowly drawn circumstances. The only regulations "covering the subject matter" of state tort liability within the meaning of the FRSA are 23 C.F.R. § 646.214(b)(3) and (b)(4). Those regulations "effectively set the terms under which railroads are to participate in the improvement of crossings." *Easterwood*, 507 U.S. at 670. In *Easterwood*, the Court certainly held that the use of federal funds in the improvement of the cross-

ing is essential to pre-emption. However, the Court used the plural, indicating that the use of federal funds was only one of "the preconditions for the application of either regulation." 507 U.S. at 671.

The text of the regulations in question states the general requirement that all grade crossings be equipped with automatic gates and flashers. However, the regulations provide two exceptions. If the hazardous conditions enumerated in §646.21(b)(3)(i) do not exist, or if in individual cases a diagnostic team, including representatives from the state and the railroad, justifies that gates are not needed, then the crossing comes within the catch-all provision of (b)(4), which does not require automatic gates, but does require federal approval of the project.

The plain text of the regulations indicates that compliance with the regulation requires *either* automatic gates or an appropriate determination based on conditions at the particular crossing that the (b)(3) conditions do not exist or do not warrant automatic gates. *See, e.g., Michael v. Norfolk Southern Ry. Co.*, 74 F.3d 271 (11th Cir. 1996) ("We leave it to the District Court on remand to determine whether Norfolk complied with the federal regulations in this regard. If not, then the plaintiffs do have a state law tort claim for negligent design or construction, based on the violation of the federal regulations.").

It is not disputed that federal funds were expended to install crossbucks at the crossings involved in the present cases. However, it is also not disputed that some of the conditions listed in § 646.21(b)(3)(i) were present at each of these crossings. As a result, the crossbuck signs in place at these crossings could only be deemed adequate if a diagnostic team had justified the absence of automatic gates and the FHWA had approved the plan. The petitioner, however, failed to prove that any diagnostic team had made such a determination for either of the crossings involved in the present cases.

Because the "burden is on the party claiming preemption to demonstrate its existence," *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984), the burden was on the petitioner to prove that the preconditions under the regulations were met. *See Easterwood*, 507 U.S. at 670 ("petitioner has failed to establish that the regulations apply to these cases, and hence we find respondent's grade crossing claim is not preempted.") In the present case, the petitioner's failure to establish that the regulations apply to the Brock Road and Pace Street crossings is fatal to its pre-emption claim.

d. The petitioner's contention that the decision of the Alabama Supreme Court is contrary to the holdings of three federal courts of appeals is unsupported by a close reading of those other decisions. In all three cases, the courts found pre-emption under 23 C.F.R. § 646.21(b)(4) because the crossings were not covered by 23 C.F.R. § 646.21(b)(3). In the present case, (b)(4) has no application because both of the crossings exhibit conditions specified in (b)(3)(i).

In *Elrod v. Burlington Northern R.R.*, 68 F.3d 241 (8th Cir. 1995), for example, the court held that the "crossing in this case falls within the purview of the latter catch-all provision, 23 C.F.R. § 646.21(b)(4), because none of the triggering conditions found in 23 C.F.R. § 646.21(b)(3) were present at that particular crossing." 68 F.3d at 243 n. 5.

Similarly, in *Hester v. CSX Transp., Inc.*, 61 F.3d 382 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 815 (1996), the court expressly noted: "Of course, passive warning devices are not adequate where section 646.214(b)(3) applies, but it seems clear on the facts before us that the applicable provision is section 646.214(b)(4)." 61 F.3d at 386 n. 6.

The petitioner's reliance on *Armijo v. Atchison, Topeka & Santa Fe Ry.*, 87 F.3d 1188 (10th Cir. 1996) is also

misplaced. In *Armijo*, contrary to the presumption against pre-emption, the court "**assume[d]** the Secretary of Transportation made a finding the crossbucks were adequate under 23 C.F.R. § 646.21(b)(4)." 87 F.3d at 1193 (emphasis added). Only the dissent by Judge Ebel recognized the significance of the majority's "assumption." 87 F.3d at 1193-94 (Ebel, J., dissenting).

In addition, in all three cases relied on by the petitioner, the courts expressly noted that there were negligence claims against the rail carriers that were not pre-empted even if 23 C.F.R. § 646.21(b)(4) applies. In *Hester*, for example, the court observed that while the plaintiffs' claims based on inadequate signalization were pre-empted, the plaintiffs' remaining negligence theories proceeded to trial. *Hester*, 61 F.3d at 384. Those remaining theories included claims

> that the visibility at the crossing was so obstructed by vegetation as to make the crossing ultrahazardous, that the crew failed to keep a proper lookout for approaching motorists, that the train was not blowing its whistle as it approached the crossing, that the crew failed to blow the warning whistle once they spotted the car, and that the crew failed to use reasonable care in applying the emergency braking system once they determined that the car was not going to stop.

61 F.3d at 384 n. 1. Similarly, the court in *Elrod* noted that the "[p]laintiffs' other claims proceeded to trial, with the jury returning a verdict on interrogatories in favor of [the rail carrier]." 68 F.3d at 243 n. 4. The other claims in *Elrod* included claims that the rail carrier was negligent

> (1) in failing to blow its horn when approaching the intersection; ... (4) in altering its policy not to require a brakeman on the train; (5) in failing to warn the Plaintiffs of existing hazards

> at the intersection; and (6) in allowing the view at the crossing to become obscured by overgrown weeds.

Elrod v. Burlington Northern RR, Nos. J-C-92-270, J-C-92-271, 1993 WL 667635 at *1 (E. D. Ark. Sept. 17, 1993). In *Armijo*, in addition to the claim that the railroad "negligently or recklessly failed to provide adequate warnings" at the crossing, the plaintiff also made a claim that the rail carrier "negligently operated the train" through the crossing. 87 F.3d at 1188. These claims were not held to be pre-empted, but were voluntarily dismissed by the plaintiff prior to appeal. 87 F.3d at 1189.

In the present cases, the respondents raised claims relating to the petitioner's negligence that were unrelated to any claim of inadequate warning signs. These additional claims were clearly not subject to pre-emption even if 23 C.F.R. § 646.21(b)(4) applied to the crossings at which the collisions occurred.

Instead of relying on the cases cited by the petitioner, the Supreme Court of Alabama correctly relied on *Michael v. Norfolk Southern Ry.*, 74 F.3d 271 (11th Cir. 1996), when it decided the present case. In *Michael*, the Eleventh Circuit stated:

> The Supreme Court in *Easterwood* held that 23 C.F.R. §§ 646.214(b)(3) and (4), where applicable, pre-empt state tort law. However those regulations deal with the design and installation of new warning devices, not the maintenance of those devices or the failure to warn the public of defective devices. Thus 23 C.F.R. §§ 646.214(b)(3) and (4) are not applicable to a claim for negligent maintenance or for a failure to warn, and do not pre-empt such claims.

Michael, 74 F.3d at 273.

CONCLUSION

The petition for a writ of certiorari should be denied.

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